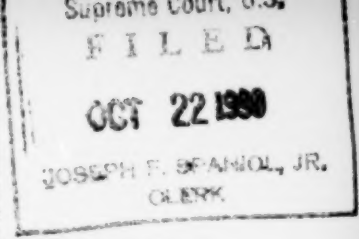


90-680

Petition No. 90-499
Cross-Petition No. _____



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ACMAT CORPORATION,
Petitioner/Cross-Respondent

v.

SCHOOL DISTRICT OF PHILADELPHIA,
Respondent/Cross-Petitioner

**CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
THIRD CIRCUIT**

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QUESTION PRESENTED

1. Whether the District Court erred by awarding Acmat amounts for alleged extra work in the absence of school board approval as required by section 5-508 of the Pennsylvania Public School Code Of 1949 and the contracts between the parties.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case. Although Hughes Urethane Construction, Inc., is listed as a third-party defendant in the caption of the Court of Appeals' Judgment Order, it had been dismissed from the action. Hughes Urethane Construction, Inc. has no interest in the outcome of the petition and is not considered a party to this proceeding. There is no other party with an interest in the outcome of the petition.

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OPINIONS BELOW

The per curiam Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the amended final judgment of the District Court, is officially reported as *Acmat Corporation v. School District of Philadelphia*, 904 F.2d 693 (3d Cir. 1990) and appears in Appendix A at 1a-2a.¹ The decision of the United States Court of Appeals for the Third Circuit, denying Acmat Corporation's ("Acmat") Petition for Rehearing, not officially reported, is printed in Appendix B at 3a-4a. The opinion and order of the United States District Court for the

1. Appendices A through J are attached to the Petition of ACMAT Corporation and are numbered sequentially throughout from 1a to 245a.

Eastern District of Pennsylvania deciding the summary judgment motion by the School District of Philadelphia ("School District"), not officially reported, is printed in Appendix C at 5a-24a.

JURISDICTION

The Judgment Order of the United States Court of Appeals is dated May 23, 1990. Acmat's Petition for Rehearing was denied by Order dated June 22, 1990. In accordance with Rule 12.3, this Cross-Petition is filed within 30 days of the receipt of Acmat's Petition for a Writ of Certiorari. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. §1254. The School District received Acmat's Petition for Writ of Certiorari on September 21, 1990.

STATUTORY PROVISION INVOLVED

Section 5-508 of Pennsylvania Public School Code of 1949, 24 P.S. §5-508, provides:

§5-508. *Majority vote required; recording* The affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects:—

Fixing length of school term.

Adopting textbooks.

Appointing or dismissing district superintendents, assistant district superintendents, associate superintendents, principals, and teachers.

Appointing tax collectors and other appointees.

Adopting the annual budget.

Levying and assessing taxes.

Purchasing, selling or condemning land.

Locating new buildings or changing the locations of old ones.

Dismissing a teacher after a hearing.

Creating or increasing any indebtedness.

Adopting courses of study.

Establishing additional schools or departments.

Designating depositories for school funds.

Entering into contracts of any kind, including contracts for the purchase of fuel or any supplies, where the amount involved exceeds one hundred dollars (\$100).

Fixing salaries or compensation of officers, teachers, or other appointees of the board of school directors.

Entering into contracts with and making appropriations to the intermediate unit for the district's proportionate share of the cost of services provided or to be provided for by the intermediate unit.

Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

STATEMENT OF THE CASE

A. Prior Proceedings

This is an action by Acmat to recover damages for alleged extra work Acmat contends it performed in connection with three asbestos removal contracts with the School District. Acmat commenced this action by Summons and Complaint in the United States District Court for the Eastern District of Pennsylvania on December 9, 1985. Acmat's negligence and Racketeer Influenced and Corrupt Organizations Act claims against the School District were later voluntarily dismissed with prejudice. Acmat's punitive damages and two fraud counts were withdrawn without prejudice.

Following the completion of discovery, the School District filed a Motion for Summary Judgment on each of Acmat's remaining claims. The School District argued, *inter alia*, that Acmat was prohibited from recovering on any contractual or quasi-contractual claims for alleged extra work because Acmat failed to obtain the approval of the School Board, as required under its contracts and under the provisions of the Pennsylvania Public School Code.

The District Court issued a twenty-two page Order in response to the School District's motion on December 21, 1988.

(App. C at 5a-25a). The District Court agreed with the School District that Acmat was required to seek and obtain the approval of the School Board in advance for any alleged extra work under its contracts with the School District. Notwithstanding this holding, however, the District Court proceeded to determine on an item-by-item basis whether Acmat was entitled to receive damages for individual items of alleged extra work. In a number of instances, the court held that Acmat was entitled to recover additional compensation from the School District for certain specific items of alleged extra work, in the absence of any formal School Board approval. At the conclusion of the Order, the District Court determined that Acmat was entitled to a total credit of \$205,723.79 for extra work against the School District's counterclaim. (App. C at 23a). This amount was later reduced to \$132,420.70 in the Amended Final Judgment. (App. F at 97a).

B. Statement Of Facts

In the spring of 1984, the School District entered into three separate written fixed-price contracts with Acmat for the removal of asbestos from three Philadelphia public schools, Fairhill, Lincoln and Rush. (App. E at 82a-96a). The contracts were duly approved by the Board of Education of the School District of Philadelphia.

Each contract included a section setting forth the manner in which the contract documents could be modified. The contracts provided that the School District could make changes in the drawings or specifications but mandated that any such changes would be subject to Board approval. (App. E at 90a-91a). These same procedures applied in those instances where a contractor claimed it had discovered site conditions differing from those shown in the contract drawings and specifications. The contracts further provided that they were being entered into subject to the provisions of the Pennsylvania Public School Code. (App. E at 85a).

The School Board approved the three fixed-price contracts for asbestos removal between the School District and Acmat. The School District and Acmat agreed, with Board approval, to

a single written change order for the work at the Fairhill School. The Board did not approve, nor did the School District ever issue, any change orders with respect to work at the Lincoln School. The parties agreed, with Board approval, to a single written change order at the Rush School. No other change orders or requests for additional compensation were approved by the School Board. The total fixed price for all three contracts was \$2,001,283. Acmat, however, subsequently sought nearly \$6,000,000 for alleged contract extras and modifications.

REASONS FOR GRANTING THE WRIT

A. The District Court Improperly Granted Damages To Acmat, Notwithstanding The Court's Holding That Board Approval Was Necessary For All Contract Modifications.

The District Court's award of damages to Acmat in the absence of School Board approval is directly at odds with the decision of the Pennsylvania Supreme Court in *Nether Providence Twp. School Auth. v. Thomas Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), and the provisions of the Pennsylvania Public School Code. *Durkin* and §5-508 of the Pennsylvania Public School Code both require formal School Board approval of any contracts or subsequent modifications to contracts entered into by school districts in Pennsylvania. The requirement of formal Board approval for all contracts and contract modifications is designed to protect public funds from subsequent claims by contractors for alleged extra work which was never properly authorized under the provisions of the Pennsylvania School Code. This compelling public interest, which has been supported for decades by the Pennsylvania courts and the Pennsylvania legislature, will effectively be frustrated if the District Court's award of damages to Acmat in the absence of formal Board approval is permitted to stand.

1. Public School Code Requirements.

In order to hold a school district liable under Pennsylvania law on a contractual understanding, the plaintiff must show that

the contract was supported by a formal resolution of a majority of school board members. Absent such a resolution, there is no enforceable contract. *The School Dist. of Phila. v. Framlau Corp.*, 15 Pa. Commw. 621, 328 A.2d 866 (1974).

The School District of Philadelphia is a separate and independent school district administered, operated and managed by the Board of Education in accordance with state and local laws. The Pennsylvania School Code of 1949 provides, in pertinent part, that:

[t]he affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects:
 Creating or increasing any indebtedness
 Entering into contracts of any kind including contracts for the purchase of fuel or any supplies, where the amount involved exceeds One Hundred Dollars (\$100.00)
 Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

24 Pa. Stat. Ann. §5-508. Each of Acmat's contracts with the School District provided that it was entered into subject to the provisions of the Pennsylvania School Code of 1949. (App. E at 85a). Acmat bore the burden of establishing both the validity of the underlying contract as well as approval of the contract by a majority of board members. *Rudolph v. Albert Gallatin School Dist.*, 60 Pa. Commw. 456, 431 A.2d 1171 (1981).

Modifications to a contract likewise require approval by a majority of Board members. *Matevish v. Ramey Boro. School Dist.*, 167 Pa. Super. 313, 74 A.2d 797 (1950). In *Matevish*, the Court concluded no liability could be imposed upon the school district for any alleged oral modifications to the contract in the absence of School Board approval.

2. Contract Requirements.

Acmat's contracts with the School District also required Board approval of all contract modifications:

[t]he School District may subject to *approval of the Board* . . . make changes in the . . . contract . . . such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in the contract price being *subject to the approval of the Board*.

(App. E at 90a)(emphasis added).

The Pennsylvania Supreme Court has vigorously enforced the requirement of Board approval for all contracts and contract modifications. In *Durkin, supra*, a school authority entered into an agreement with a contractor to construct a new high school for a fixed price. After construction began, the contractor noticed discrepancies between the site plan topography contour lines and the actual topographical conditions. As a result, the contractor was required to perform additional work at the job site.

Before the job was completed, the parties disputed who would bear the cost of the additional work. The school authority's president authorized the school authority's secretary to write to the contractor to acknowledge the dispute and recommend that the contractor continue the work and hold the resolution of the disagreement in abeyance. After the job was completed, the contractor submitted a claim to the school authority for the extra work claiming that he had been induced to perform the work by the letter authorized by the school authority's president.

Recognizing the long line of Pennsylvania cases requiring strict adherence to the provisions of public contracts, the Pennsylvania Supreme Court denied these claims for additional compensation. The construction contracts in *Durkin* provided that "no change in the contract shall be made without the written approval of the Board." The Court, therefore, declined to allow the contractor to recover since written approval of the Board was never obtained. In so holding, the Court stated:

[w]e have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds, to uphold the integrity of the bidding process, and we see no reason to change our long-established precedents today. We reiterate that public agreements can be altered only by the same formal municipal action that created them or express ratification by resolution of the public body.

505 Pa. at 48-49, 476 A.2d at 907.

The Court in *Durkin* rejected the contractor's claim that the school authority had waived the requirement that changes to the contract needed the approval of the Board. The Court held that the provision in a public contract relating to the manner in which changes to the contract can be made can be waived *only* by formal action of the Board or by express ratification of the extra work by resolution of the Board. The Court, therefore, held that the letter prepared by the school authority's president and secretary was not the act of the full Board and that the formal written action requirement for waiver had not been satisfied. The Court also observed that the Board had never adopted a resolution ratifying the extra work. Relying upon *Durkin*, the District Court here acknowledged that §5-508 of the Pennsylvania Public School Code requires formal Board approval of any alleged extra work. (App. C at 5a-6a).

Acmat did not allege that it had ever received formal Board approval for any of the items of extra work for which it was seeking additional compensation. The District Court did not find even a single instance of Board approval for alleged extra work in its Order of December 21, 1988. Based on the provisions of the Public School Code and the contracts between the parties, the District Court should have entered judgment in favor of the School District in response to each of Acmat's claims for alleged extra work.

Instead, the District Court awarded damages to Acmat in several instances based on written directions from employees of the School District that certain work was to be performed on a time and material basis. The District Court erred as a matter of

law in doing so. The Pennsylvania Supreme Court in *Durkin* held that the requirement of formal Board approval must be adhered to and can only be waived by formal Board resolution. Acmat never alleged any formal delegation of authority by the Board here, as no such authority existed. Acmat's contracts with the School District, furthermore, specifically provided that verbal instructions given by any of the officers, agents or employees of the Board which depart from contract documents "shall not be binding upon the Board." (App. E at 91a). Therefore, the District Court's award of damages to Acmat in the absence of Board approval was in error and must be reversed.

CONCLUSION

Based on the foregoing legal and factual arguments, it is respectfully requested that the School District of Philadelphia's Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted, *l*



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Dated: October 22, 1990